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DEEPAK JAIKISHAN v. A SANTAMIL SELVI ALAU MALAY & ORS

FEDERAL COURT, PUTRAJAYA
ZULKEFLI AHMAD MAKINUDIN CJ (MALAYA)
ZAINUN ALI FCJ
B ABU SAMAH NORDIN FCJ
RAMLY ALI FCJ
BALIA YUSOF WAHI FCJ
[CIVIL APPEAL NO: 01(f)-14-05-2016]
18 APRIL 2017

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CIVIL PROCEDURE: *Appeal – Notice of appeal – Objection to – Whether notice deemed defective by Court of Appeal – Whether objection pertaining to notice being bad in law could be undertaken by preliminary objection – Whether there would be substantial miscarriage of justice if case proceeded – Filing of single notice*
D *of appeal in respect of decision on eight separate interlocutory applications – Whether in compliance with procedural rules – Rules of the Court of Appeal 1994, rr. 5(3), 27*

CIVIL PROCEDURE*: Preliminary objection – Dismissal of – Appeal against – Whether objection pertaining to defective notice of appeal could be undertaken by*
E *mere preliminary objection – Whether allowing preliminary objection could prevent miscarriage of justice*

The plaintiffs filed a writ in the High Court to claim for damages against the defendants for the tort of conspiracy to cause injury by unlawful means. The plaintiffs filed the claim against nine defendants. Each of the nine defendants
F filed an application to strike out the plaintiff's writ under O. 18 r. 19 of the Rules of Court 2012. The High Court Judge allowed these applications on the grounds that the plaintiffs failed to plead material facts that would sustain their claim. Dissatisfied, the plaintiffs appealed to the Court of Appeal and filed only one notice of appeal against the decision of the High Court Judge.
G Save for the eighth defendant, all of the defendants filed separate notices of motion wherein they applied for the notice of appeal of the plaintiffs to be struck out on grounds that the notice of appeal was bad in law for not filing a separate notice of appeal against the decision of the High Court. The Court of Appeal allowed these applications and the plaintiffs' notice of appeal was
H struck out. Nevertheless, the Court of Appeal held that the plaintiffs' notice of appeal against the eighth defendant was still valid presumably on the basis that the eighth defendant had not filed a notice of motion for his application. The plaintiffs' appeal against the eighth defendant was heard before another panel of the Court of Appeal. At the preliminary stage of the hearing, the
I eighth defendant raised a preliminary objection arguing that since the notice of appeal of the plaintiffs was bad in law, there was therefore no proper

appeal before the Court of Appeal and the plaintiffs' appeal should be dismissed. The Court of Appeal, however, dismissed the preliminary objection on the ground that the eighth defendant should have filed a proper application by way of notice of motion to strike out the plaintiffs' appeal against him. The eighth defendant filed an application for leave to appeal against the decision of the Court of Appeal in dismissing his preliminary objection. The Federal Court allowed the eighth defendant's leave application with the following questions of law: (i) whether as a matter of procedural law, an objection pertaining to the notice of appeal being defective and/or bad in law could be undertaken by way of a mere preliminary objection; and (ii) whether the filing of a single notice of appeal in respect of a decision on eight separate and distinct interlocutory applications was in compliance with the procedural rules as set out in the Rules of the Court of Appeal 1994 ('RCA 1994').

Held (allowing appeal; affirming and reinstating decision of High Court) Per Zulkefli Ahmad Makinudin CJ (Malaya) delivering the judgment of the court:

(1) Rule 27 of the RCA 1994 states that all applications to the Court of Appeal must be made by way of a motion as provided for in Form 4 in the First Schedule to RCA 1994. It is trite that parties to a proceeding must file by way of a notice of motion for any application that needs to be decided by the Court of Appeal. (para 10)

(2) Because the notice of appeal filed by the plaintiff has been deemed to be defective by the Court of Appeal, it would be a substantial miscarriage of justice if the case was to be proceeded forthwith solely against the eighth defendant. This would put the eighth defendant in a difficult situation as he would have to answer the case against him on his own. More so in the present case wherein the plaintiffs' cause of action against all the nine defendants including the eighth defendant was for the tort of conspiracy to cause injury by unlawful means and the claims against all other alleged co-conspirators had been dismissed and/or struck out. By allowing the preliminary objection, it would have prevented a substantial miscarriage of justice against the eighth defendant. Since the notice of appeal filed by the plaintiffs was found to be bad in law, there was therefore no proper appeal before the court. The first question of law was answered in the affirmative. (paras 13 & 14)

(3) The main purpose of r. 5(3) of the RCA 1994 is to allow the opposing parties to be able to answer their cases respectively. The High Court Judge had, in her grounds of judgment, explained in detail her decision in allowing the striking out application of each party in separate interlocutory applications. The plaintiffs were in a position to identify

A the relevant points in the said judgment that they were dissatisfied with and thereafter file a separate notice of appeal against all the defendants setting out the details of the decisions in the notice of appeal. (para 19)

(4) Each of the defendants in the High Court had filed eight separate applications to strike out the plaintiffs' statement of claim. All eight B applications had different grounds in support of the respective application, different filing dates and even different counsel. The High Court Judge had delivered a single judgment encompassing all of the eight applications. By way of procedural rules, there were eight separate orders made by the High Court Judge. Thus, the second question was C answered in the negative. (para 20)

Bahasa Malaysia *Headnotes*

Plaintif-plaintif memfailkan writ di Mahkamah Tinggi memohon ganti rugi terhadap defendan-defendan bagi tort konspirasi menyebabkan kerugian D dengan cara yang tidak sah. Plaintif-plaintif memfailkan permohonan terhadap sembilan defendan. Setiap defendan memfailkan permohonan membatalkan writ plaintif di bawah A.18 k.19 Kaedah-Kaedah Mahkamah 2012. Hakim Mahkamah Tinggi membenarkan permohonan-permohonan ini atas alasan bahawa plaintif-plaintif gagal memplidkan fakta material yang E boleh mengekalkan tuntutan mereka. Tidak berpuas hati, plaintif-plaintif merayu ke Mahkamah Rayuan dan memfailkan hanya satu notis rayuan terhadap keputusan Hakim Mahkamah Tinggi. Kecuali defendan kelapan, kesemua defendan memfailkan notis usul berasingan di mana masing-masing memohon notis rayuan plaintif dibatalkan atas alasan notis rayuan tersebut adalah salah dari segi undang-undang kerana tiada pemfailan notis rayuan F berasingan terhadap keputusan Mahkamah Tinggi. Mahkamah Rayuan membenarkan permohonan-permohonan ini dan notis rayuan plaintif dibatalkan. Walau bagaimanapun, Mahkamah Rayuan memutuskan bahawa notis rayuan plaintif-plaintif terhadap defendan kelapan masih sah berdasarkan kegagalan defendan kelapan memfailkan notis usul untuk G permohonannya. Rayuan plaintif-plaintif terhadap defendan kelapan didengar di hadapan panel lain Mahkamah Rayuan. Pada peringkat awal perbicaraan, defendan kelapan membangkitkan bantahan awalan dengan hujahan notis rayuan plaintif salah dari segi undang-undang, oleh itu tiada rayuan yang sah di hadapan Mahkamah Rayuan dan rayuan plaintif-plaintif H harus ditolak. Mahkamah Rayuan, walau bagaimanapun, menolak bantahan awalan defendan kelapan atas alasan bahawa defendan kelapan sepatutnya memfailkan permohonan yang betul melalui notis usul untuk membatalkan rayuan plaintif-plaintif terhadapnya. Defendan kelapan memfailkan permohonan kebenaran untuk merayu terhadap keputusan Mahkamah Rayuan dalam menolak bantahan awalannya. Mahkamah Persekutuan I membenarkan permohonan kebenaran dengan soalan undang-undang berikut:

(i) sama ada berdasarkan undang-undang prosedur, bantahan terhadap notis rayuan yang defektif dan/atau salah dari segi undang-undang boleh dilaksanakan melalui bantahan awalan; dan (ii) sama ada pemfailan satu notis rayuan berkenaan keputusan ke atas lapan permohonan interlokutori yang berasingan mematuhi prosedur yang telah ditetapkan dalam Kaedah-Kaedah Mahkamah Rayuan 1994 ('KMR 1994').

Diputuskan (membenarkan rayuan; mengesahkan dan mengembalikan keputusan Mahkamah Tinggi)

Oleh Zulkefli Ahmad Makinudin HB (Malaya) menyampaikan penghakiman mahkamah:

(1) Kaedah 27 KMR 1994 menyatakan bahawa semua permohonan ke Mahkamah Rayuan harus dibuat melalui usul seperti yang diperuntukkan dalam Borang 4 Jadual Pertama KMR 1994. Adalah undang-undang matan bahawa pihak-pihak yang terlibat dalam prosiding harus memfailkan melalui notis usul untuk mana-mana permohonan yang perlu diputuskan oleh Mahkamah Rayuan.

(2) Oleh kerana notis rayuan yang difailkan oleh plaintif dianggap cacat oleh Mahkamah Rayuan, menjadikan satu salah laksana keadilan yang berat jika kes diteruskan hanya terhadap defendan kelapan. Ini meletakkan defendan kelapan dalam situasi yang agak rumit kerana perlu menjawab kes terhadapnya dengan sendiri. Lebih-lebih lagi dalam kes ini di mana kausa tindakan plaintif terhadap sembilan defendan termasuk defendan kelapan adalah untuk tort konspirasi menyebabkan kerugian melalui cara yang menyalahi undang-undang dan tuntutan-tuntutan terhadap semua pengkomplot-pengkomplot lain yang didakwa telah ditolak dan/atau dibatalkan. Dengan membenarkan bantahan awalan, ini akan menghalang satu salah laksana keadilan serius terhadap defendan kelapan. Oleh kerana notis rayuan yang difailkan oleh plaintif-plaintif didapati menyalahi undang-undang, tiada rayuan yang sah di mahkamah. Soalan undang-undang pertama dijawab secara afirmatif.

(3) Tujuan utama k. 5(3) KMR 1994 adalah untuk membenarkan pihak-pihak berlawanan menjawab kes-kes masing-masing. Hakim Mahkamah Tinggi telah, dalam alasan penghakimannya, menjelaskan secara terperinci keputusannya membenarkan permohonan pembatalan setiap pihak dalam permohonan interlokutori berasingan. Plaintif-plaintif berada di dalam kedudukan untuk mengenal pasti perkara-perkara relevan dalam penghakiman tersebut yang tidak memuaskan hati mereka dan memfailkan notis rayuan berasingan terhadap kesemua defendan-defendan dengan membentangkan butir-butir keputusan-keputusan dalam notis rayuan.

(4) Setiap defendan dalam Mahkamah Tinggi memfailkan lapan permohonan berasingan untuk membatalkan penyataan tuntutan plaintif-

plaintif. Semua lapan permohonan mempunyai alasan berbeza yang menyokong permohonan masing-masing, tarikh pemfailan berbeza dan juga peguam lain-lain. Hakim Mahkamah Tinggi telah menyerahkan satu penghakiman merangkumi kesemua lapan permohonan. Melalui kaedah-kaedah prosedur, terdapat lapan perintah berasingan yang dibuat oleh Hakim Mahkamah Tinggi. Oleh itu, soalan kedua dijawab secara negatif.

Case(s) referred to:

A Santamil Selvi Alau Malay & Ors v. Dato' Seri Mohd Najib Tun Abdul Razak & Ors [2015] 4 CLJ 1016 CA ***(refd)***

Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (Interveners) [2007] 4 CLJ 725 FC ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 18 r. 19
Rules of the Court of Appeal 1994, rr. 3A, 5(3), 27, Schedule

For the appellant - Muhammad Shafee Abdullah & Sarah Abishegam; M/s Shafee & Co
For the respondents - Americk Sidhu; M/s Americk Sidhu
Watching brief for the respondents - Jeremy Khalif Lee; Bar Malaysia

[Editor's note: For the Court of Appeal judgment, please see A Santamil Selvi Alau Malay @ Anna Malay & Ors v. Deepak Jaikishan [2015] 1 LNS 1221 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Zulkefli Ahmad Makinudin CJ (Malaya):

[1] This is an appeal by the appellant against the decision of the Court of Appeal in allowing the appeal by the respondents against the decision of the High Court. The appellant in this case was the eighth defendant and the respondents were the plaintiffs before the High Court. For ease of reference, we shall refer the parties as they were in the High Court.

[2] The plaintiffs filed a writ in the High Court at Kuala Lumpur to claim for damages against the defendants for the tort of conspiracy to cause injury by unlawful means. The plaintiffs filed the claim against nine defendants including the eighth defendant. Each of the nine defendants including the eighth defendant filed an application to strike out the plaintiffs' writ under O. 18 r. 19 of the Rules of Court 2012 ("RC 2012"). After hearing these applications in a single sitting, the learned High Court Judge allowed these applications with costs.

[3] The learned High Court Judge had clearly stated in her judgment the grounds of allowing each application of the defendants. Essentially, all of the applications were allowed on the grounds that the plaintiffs had failed to plead material facts that would sustain their claim against all of the nine

defendants. The failure to plead material facts to prove the existence of a tort of conspiracy against the nine defendants tantamount to bare allegations and that the plaintiffs' statement of claim is deemed to be frivolous and vexatious. All of the defendants' application were allowed with costs.

[4] Dissatisfied with the decision of the High Court, the plaintiffs then appealed to the Court of Appeal. The plaintiffs filed only one notice of appeal against the decision made by the learned High Court Judge. The notice of appeal reads:

> TAKE NOTICE THAT A. Santamil Selvi a/p Alau Malay @ Anna Malay, Kishen a/l Balasubramaniam, Menaga a/p Balasubramaniam and Reeshi a/l Balasubramaniam,being dissatisfied with the decision of the Honourable Justice Datuk Hasnah Bte Dato' Mohamed Hashim given at the High Court Kuala Lumpur on the 11th day of December 2014, appeals to the Court of Appeal against the whole of the said decision granting the Order-in-Terms of all the Defendants' applications to strike out the Plaintiffs' claims under Order 18 rule 19(1) of the Rules of Court 2012.

[5] Save for the eighth defendant, all of the defendants filed seven separate notices of motion wherein they applied for the notice of appeal of the plaintiffs to be struck out on the grounds that the notice of appeal was bad in law for not filing a separate notice of appeal against the decision of the High Court in allowing the defendants separate application to strike out the plaintiffs' statement of claim. The Court of Appeal heard these notices of motion on 10 May 2015. The Court of Appeal unanimously allowed these applications and the plaintiffs' notice of appeal was struck out with costs. Nevertheless, the Court of Appeal held that the plaintiffs' notice of appeal against the eighth defendant was still valid presumably on the basis that the 8th defendant had not filed a notice of motion for his application. A hearing date of the appeal against the eighth defendant by the plaintiffs was fixed for it to be heard.

[6] The plaintiffs' appeal against the eighth defendant was heard on 2 October 2015 before another panel of the Court of Appeal. At the preliminary stage of the hearing, learned counsel for the eighth defendant raised a preliminary objection arguing that since the notice of appeal of the plaintiffs was bad in law, there was therefore no proper appeal before the Court of Appeal and the plaintiffs' appeal should be dismissed.

[7] The Court of Appeal dismissed the preliminary objection of the eighth defendant on the ground that the eighth defendant should have filed a proper application by way of notice of motion to strike out the plaintiffs' appeal against him. The Court of Appeal proceeded to hear the appeal. The Court of Appeal allowed the appeal and set aside the decision of the High Court. The eighth defendant was ordered to file his defence.

[8] The eighth defendant filed an application for leave to appeal against the decision of the Court of Appeal in dismissing his preliminary objection. The Federal Court on 18 December 2015 allowed the eighth defendant's leave application with the following questions of law:

(i) Whether as a matter of procedural law, an objection pertaining to the notice of appeal being defective and/or bad in law can be undertaken by way of a mere preliminary objection?

(ii) Whether the filing of a single notice of appeal in respect of a decision on eight separate and distinct interlocutory applications is in compliance with the procedural rules as set out in the Rules of the Court of Appeal 1994?

(iii) Whether as a matter of law a claim in conspiracy to injure can be maintained and/or is valid when the claims against all other alleged co-conspirators have been dismissed and/or struck out on the basis that there was no reasonable cause of action raised by the plaintiffs?

Decision Of This Court

[9] On the first question posed before this court, the main argument of learned counsel for the eighth defendant is that the Court of Appeal should have invoked its own inherent jurisdiction to intervene and set aside the defective notice of appeal of the plaintiffs in light of the existing ruling that it had struck out the same notice of appeal against all the other defendants. Learned counsel for the eighth defendant highlighted to us several case authorities to show that the court has the authority to exercise its discretion to prevent any form of injustice. Learned counsel for the plaintiffs, however, submitted that the issue now raised by the eighth defendant has become academic in view of the fact that the earlier panel of the Court of Appeal had ruled that the eighth defendant should file by way of notice of motion to strike out the plaintiffs' notice of appeal in the same mode of application the other defendants had done so.

[10] We noted that the provision of r. 27 of the Rules of the Court of Appeal 1994 ("RCA 1994") states that all applications to the Court of Appeal must be made by way of a motion as provided for in Form 4 in the First Schedule to RCA 1994. It is trite that parties to a proceeding must file by way of a notice of motion for any application that needs to be decided by the Court of Appeal.

[11] The eighth defendant did not file any application by way of notice of motion to strike out the plaintiffs' notice of appeal. Instead, the eighth defendant raised during the hearing that the notice of appeal filed by the plaintiffs was deemed bad in law by way of preliminary objection. The provision on preliminary objection is provided for under r. 3A of the RCA 1994 as follows:

> A Court or Judge shall not allow any preliminary objection by any party only on the ground of non-compliance of any of these Rules unless the Court or Judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice.

[12] At first glance, a reading of the above provision implies that a preliminary objection on grounds of non-compliance to any of the provisions in RCA 1994 cannot be allowed. However, if it is found that the non-compliance of any of the provision in RCA 1994 has occasioned a substantial miscarriage of justice, then the preliminary objection may be allowed.

[13] We are of the view that because the notice of appeal filed by the plaintiffs has been deemed to be defective by the Court of Appeal, it will be a substantial miscarriage of justice if the case is to be proceeded forthwith solely against the eighth defendant. This will put the eighth defendant in a difficult situation as he has to answer the case against him on his own. More so in the present case wherein the plaintiffs' cause of action against all the nine defendants including the eighth defendant is for the tort of conspiracy to cause injury by unlawful means and the claims against all other alleged co-conspirators have been dismissed and/or struck out. On this point we would like to reaffirm the view expressed by the Federal Court in *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (Interveners)* [2007] 4 CLJ 725; [2007] 5 MLJ 501, wherein Abdul Hamid Mohamad FCJ (as he then was), had made the following observation at p. 796 (CLJ); p. 547 (MLJ) as follows:

> Secondly, this Court has repeatedly held that it has inherent jurisdiction 'to make any order that may be necessary to prevent injustice or to prevent any abuse of the process of the court'.

[14] We are of the considered view that by allowing the preliminary objection, it would have definitely prevented a substantial miscarriage of justice against the eighth defendant. Since the notice of appeal filed by the plaintiffs was found to be bad in law there is therefore no proper appeal before the court. In the circumstances of this case, we would answer the first question of law in the affirmative.

[15] We shall now deal with the second question of law posed before us. The second question of law is whether the filing of a single notice of appeal in respect of a decision on eight separate and distinct interlocutory applications is in compliance with the procedural rules as set out under RCA 1994.

[16] As earlier alluded to, the eighth defendant and all the other defendants in this case filed separate applications for the striking out of the plaintiffs' statement of claim at the High Court. The plaintiffs, having appealed against the decision of the High Court in allowing these applications, filed only a single notice of appeal against the decision of the learned judge of the High Court.

[17] It is to be noted that r. 5(3) of RCA 1994 pertaining to Civil Appeal to the Court of Appeal provides that a notice of appeal shall substantially be in Form 1 in the First Schedule. The word "shall" denotes that it is mandatory for the parties to comply with the provision under the said rule. We are of the view that the plaintiffs should have filed separate notices of appeal against the decision of the High Court in allowing the defendants' separate applications to strike out the plaintiffs' statement of claim.

[18] On this issue of the plaintiffs having to file a separate notice of appeal, useful reference can be made to the case of *A Santamil Selvi a/p Alau Malay & Ors v. Dato' Seri Mohd Najib Tun Abdul Razak & Ors* [2015] 4 CLJ 1016. This is the very case where the Court of Appeal had heard the application by way of notice of motion of all the other eight defendants to strike out the plaintiffs' notice of appeal against the decision of the High Court of our current case. The Court of Appeal amongst others had made the following observations:

> [13] It is, therefore, a statutory requirement that the notice of appeal must be in the prescribed Form 1. We agree with the learned counsel for the first and second respondents that the RCOA envisages two situations: one where a dissatisfied party appeals against one decision and second, where a dissatisfied party appeals against more than one decision. To that, we must add that it includes also a situation where a dissatisfied party appeals against part only of the decision or decisions given.
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> [14] In our view, where the appeal is against one decision involving a single respondent or involving more than one respondent in a joint action, it will be in order for the appellant to state in a single notice of appeal that he is appealing against "the whole of the said decision". But where the appeal is against more than one decision arising from the separate interlocutory application made by different parties to the action, it is incumbent on the appellant to set out the details of the decisions in the notice of appeal.
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> [15] In the present case, since more than one decision was given by the High Court in favour of nine different applications arising from eight separate and distinct applications, it was imperative for the appellants to set out the details of each and every one of the decisions that they were appealing against. We do not think it was sufficient for the appellants to state in general terms in a single notice of appeal that their appeal was against the 'whole of the said decision' (in the singular) without specifying the particulars of the decisions appeal against.

[19] We are in agreement with the above views expressed by the Court of Appeal. The main purpose of r. 5(3) of RCA 1994 is to allow the opposing parties to be able to answer their cases respectively. The learned High Court Judge had, in her grounds of judgment, explained in detail her decision in allowing the striking out application of each party in that separate interlocutory applications. The plaintiffs were in a position to identify the

relevant points in the said judgment that they are dissatisfied with and thereafter filed a separate notice of appeal against all the defendants setting out the details of the decisions in the notice of appeal.

[20] It is also to be noted that each of the defendant in the High Court had filed eight separate applications to strike out the plaintiffs' statement of claim. All eight applications had different grounds in support of the respective application, different filing dates and even different counsels. The learned High Court Judge delivered a single judgment encompassing all of the eight applications. It is our judgment by way of procedural rules there were eight separate orders made by the learned High Court Judge. We would therefore answer the second question posed before us in the negative.

[21] As regards the third question of law posed before us we do not think we should answer it in view of our answers to question (i) and (ii).

Conclusion

[22] For the reasons abovestated we find there is merit in the appellant's appeal. The appeal by the appellant is allowed with no order as to costs. The decision of the High Court is affirmed and reinstated.